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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1342

THOMAS BALOGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is a continuation of the litigation which was before the Court earlier this Term in *United States v. Balogh*, No. 800. It will be recalled that petitioner was convicted in the United States District Court for the Eastern District of New York for having failed to report for induction, in violation of Section 11 of the Selective Training and Service Act of 1942 (50 U. S. C. App., Supp. V, 311). Upon his appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed on the ground that consideration by the classifying boards of an advisory recommendation of the Theological Panel invalidated petitioner's final

classification (see R. 117-123, 124-130). The Government then filed a petition for a writ of certiorari challenging the correctness of the Second Circuit's decision on the ground that by failing to report to the induction station for his final physical examination petitioner failed to exhaust his administrative remedies and he therefore was not entitled to challenge the legality of his classification in the criminal proceeding. Petitioner filed a response to the Government's petition and on January 20, 1947, this Court rendered the following per curiam decision:

The petition for writ of certiorari is granted. The judgment is vacated and the case remanded to the United States Court of Appeals. *Falbo v. United States*, 320 U. S. 549.

On the remand to the circuit court of appeals, the case was again argued, and on April 7, 1947, that court affirmed the judgment of the district court (R. 134-138). The circuit court of appeals held that under the established selective service procedure, petitioner was required to report to the induction station where his final acceptability for military service would have been determined. Since he failed to report, the court concluded that he had not exhausted his administrative remedies and that the defense of illegal classification was not available to him.

The present petition for a writ of certiorari seeks to raise the questions which were before this

Court earlier in the Term upon the petition for certiorari by the Government and which were resolved adversely to petitioner. The same questions were also before the Court at that time in *Cahoon v. United States*, No. 183, certiorari denied, October 14, 1946, rehearing denied, January 20, 1947; *Hudson v. United States*, No. 887, certiorari denied, February 3, 1947; *Garland v. United States*, No. 911, and *Wells v. United States*, No. 916, certiorari denied, March 3, 1947; *Turner v. United States*, No. 871, certiorari denied, March 3, 1947. The considerations in answer to petitioner's present contentions are fully set forth in our earlier petition for certiorari, as well as in our briefs in opposition filed in the above-cited cases.

Since the present petition for a writ of certiorari is in effect nothing more than a belated second petition for rehearing addressed to this Court's January 20, 1947, decision, it is respectfully submitted that the petition should be denied.

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Acting Solicitor General.

THERON L. CAUDLE,
✓ *Assistant Attorney General.*

✓ ROBERT S. ERDAHL,
✓ IRVING S. SHAPIRO,
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MAY 1947.